

89-1548

Supreme Court, U.S.
FILED

MAR 9 1990

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH R. SARNICK, JR.
CLERK

October Term 1989

No. _____

IRVIN D. STAGNER,
Pro Se Petitioner-Appellant

v.

UNITED STATES PATENT & TRADEMARK OFFICE,
COMMISSIONER OF PATENTS, DONALD QUIGG,
DEPUTY ASSISTANT COMMISSIONER, JAMES E.
DENNY, PETITION EXAMINER, JEFFREY V.
NASE, DIRECTOR OF PATENT EXAMINING
GROUP 320, SAMIH N. ZAHARNA, SUPERVISOR
OF PATENT EXAMINING GROUP 320, FREDERICK
R. SCHMIDT, PATENT EXAMINERS OF GROUP
320, JAMES G. SMITH AND DEBRA MEISLIN

Appellees

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner Pro Se
Irvin D. Stagner
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Wichita, KS 67211
316 264 2723

QUESTIONS PRESENTED

Did Congress separate by a line of demarcation (37 CFR 1.113) into two remedies for disputes in the examination of patent applications, one merit of the invention (37 CFR 1.191) and the other Administrative procedure used in the examination of patent application (37 CFR 1.181)?

Can a suit be filed in a District Court in accordance with 37 CFR 1.113, 37 CFR 1.181, 35 USCA 141 and 35 USCA 145 Title 5 USCA 500-706 and the Due Process of the Fifth Amendment of the Constitution, for review of the the Patent and Trademark Administrative Procedure in the examination of patents and then a defense of merit be entered only as a way to avoid the review of patent Administrative Procedure?

Who interprets a U.S. statutes, such as, 35 USC 103 and what obvious is,

does a quasi-judicial person, such as, a patent examiner have the right to have a interpretation of the statute separate from the cases in reference under that statute?

What was congress intent by 28 USC Rule 16(a, b. c. #3) of the Rules of Practice for the District court for the District of Kansas, to hold hearings or review by trial a Administrative record made before a United States Government Agency and what was congress intent by the Due Process of the Fifth Amendment of the Constitution United States and can that Due Process be applied to patent applications?

Can a Pro se conduct his own case in a trial court under 28 USC 1654, without counsel and without court prejudice and can a Pro Se, file for patent by a patent application, in the Patent office without prejudice of the patent office because he is Pro Se?

LIST OF OTHER PARTIES

List of parties to the proceedings in the court whose judgment is sought to be reviewed.

Judge Patrick F. Kelly.

Judge of the June 29, 1989, Summary Judgment, Memorandum and Order for the District Court for the District of Kansas.

Circuit Judge, Archer.

Senior Circuit Judge, Cowen.

Circuit Judge, Mayer.

Judges for the United States Court of Appeals for the Federal Circuit, that affirmed the District Court Summary Judgment entered June 29 1989, in a decision and Opinion entered January 25, 1990.

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Manual of Patent Examining Procedure

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37 CFR 1.1077, 9, 16, 18, 51.
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37 CFR 1.116.....28.
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Louisiana Public Service Comm. v. FCC
(1986, US) 90 L Ed 2d 369,
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U. S. ex rel. Smith v. Nelson,
D.C. Cal. 1967, 275 F. Supp. 261.4.

CASES CITED CONTINUED

Petite v. U. S., C. A.Md. 1959,
262 F.2d 788, remanded on other grounds
80 S. Ct. 450, 361 U.S. 529,
4 L.Ed. 2d 490.4.

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Application of Mindick,
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Pre-Fab Transit Co. v. U.S.,
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DECISIONS OF THE PATENT AND TRADEMARK OFFICE

OFFICE ACTIONS (REJECTIONS).

See Administrative Record
Application Serial No. 671,168.

Date	Pages
September 13, 1985	0085
December 18, 1985	0146
February 5, 1986	0255

Application Serial No. 837,504.	
December 22, 1986	0432
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Application Serial No. 671,167.	
September 13, 1985	0855
December 18, 1985	0933
February 4, 1986	1046
(see Joint Appendix)	

Application Serial No. 837,430.	
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Application Serial No. 671,169.	
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February 6, 1986	1812

Application Serial No. 837,502	
February 18, 1987	1978
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DECISIONS IN ANSWER TO
 37 CFR 1.181 PETITIONS
 Decisions included each (3) application
 See Administrative Record

Date	Pages
February 13, 1986	0257
(see Joint Appendix)	
May 15, 1986	1187
April 29, 1987	1339
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September 17, 1987	1367

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PETITION FOR WRIT OF CERTIORARI TO
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To the Honorable, the Chief Justice
and Associates Justices of the Supreme
Court of the United States:

Irvin D. Stagner, the Petitioner Pro
Se, herein, prays that a writ of
certiorari issue to review the June 29,
1989, Summary Judgement, Memorandum and
Order of the United States District
Court for the District of Kansas, that

was affirmed by Decision of the United States Court of Appeals for the Federal Circuit and entered on January 25, 1990.

OPINION(S) BELOW

The opinion of the United States District Court for the District of Kansas in the case of Stagner v. United States Patent and Trademark Office granting Summary Judgment against the plaintiff on June 29, 1989, appears in 11 USPQ2d 1553 (D. Kan. 1989) and is included in Joint Appendix (separate) and the January 25, 1990, opinion of the United States Court of Appeals for the Federal Circuit, affirmed the June 29, 1989, Summary Judgment United States District Court for the District of Kansas in the case of Stagner v. United States Patent and Trademark Office, which has not been prepared for publication in a printed volume and will appear in the tables published periodically, and is included in Joint Appendix (separate).

JURISDICTION

The June 29, 1989 Summary Judgement, Memorandum and Order of the United States District Court for the District of Kansas, that was affirmed by Decision of the United States Court of Appeals for the Federal Circuit by Circuit Judge, ARCHER, Senior Circuit Judge, COWEN and Circuit Judge, MAYER entered on January 25, 1990, in this case and the Supreme Court should exercise jurisdiction herein.

The jurisdiction of the Supreme Court is invoked under the provisions of Title 28 USC 1254(1), 28 USC 2101, 28 USC 2103, 28 USC 2106 & 28 USC 2108.

Cases that sustain the jurisdiction of this Court include:

Kerr v. United States Dist. Court for the Northern Dist., 426 US 394, 48 L Ed 2d 725, 96 S Ct. 2119.

Louisiana Public Service Comm. v. FCC (1986, US) 90 L Ed 2d 369, 106 S Ct 1890.

Right to remedy of certiorari in the United States Supreme Court is Provided by federal law. U. S. ex rel. Smith v. Nelson, D.C. Cal. 1967, 275 F. Supp. 261.

Petite v. U. S., C. A.Md. 1959, 262 F.2d 788, remanded on other grounds 80 S. Ct. 450, 361 U.S. 529, 4 L.Ed. 2d 490.

Pursuant to Rules 10, 12, 13 and 14 of the Rules of the Supreme Court of the United States, Petitioner, Pro Se, Irvin D. Stagner, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the final the June 29, 1989, Summary Judgement, Memorandum and Order of the United States District Court for the District of Kansas, that was affirmed by Decision of the United States Court of Appeals for the Federal Circuit and entered on January 25, 1990, by Circuit Judge, ARCHER, Senior Circuit Judge, COWEN and

Circuit Judge, MAYER.

This appeal arises from an action to the case of Stagner v. United States Patent and Trademark Office that was filed in the United States District Court for the District of Kansas, with jurisdiction of that Court under 35 USC 141 & 35 USC 145, 37 CFR 1.113 & 37 CFR 1.191 and 28 USC 1291, 28 USC 1338, 28 USC 1361, 28 USC 1391 and 28 USC 1631, Title 5 USC 500-706 and the Fifth Amendment of the United States Constitution.

The Summary Judgment of the United States District Court for the District of Kansas was entered on June 29, 1989, whereas, the United States Court of Appeals for the Tenth Circuit is the appeal court for the United States District Court for the District of Kansas, a timely notice of appeal to the United States Court of Appeals for the Tenth Circuit was entered on July 17, 1989, in the United States District

Court for the District of Kansas. The United States Court of Appeals for the Tenth Circuit transferred the case to the United States Court of Appeals for the Federal Circuit on September 5, 1989. The case was placed on the docket of the United States Court of Appeals for the Federal Circuit on September 15, 1989, with jurisdiction under 35 USC 141 & 35 USC 145, 37 CFR 1.113 & 37 CFR 1.181 and 28 USC 1291 & 28 USC 1295.

CONSTITUTIONAL AND
STATUTES INVOLVED

FIFTH AMENDMENT OF THE
UNITED STATES CONSTITUTION
AND DUE PROCESS.

Title 5 USCA 500-706.
ADMINISTRATIVE PROCEDURE ACT.
FOR REVIEW OF A RECORD MADE
BEFORE A ADMINISTRATIVE AGENCY.

For verbatim see Joint Appendix

TITLE 28 USCA.
RULES OF PRACTICE OF THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS
RULE 16 (a), (b) and (c #3).

35 USCA 101.
INVENTIONS PATENTABLE. .

35 USCA 102.
CONDITIONS FOR PATENTABILITY;
NOVELTY AND LOSS OF RIGHT.

35 USCA 103.
CONDITIONS FOR PATENTABILITY;
NON-OBVIOUS SUBJECT MATTER.

35 USCA 141.
APPEAL TO COURT OF APPEALS
FOR THE FEDERAL CIRCUIT.

35 USCA 145.
CIVIL ACTION TO OBTAIN
A PATENT.

37 CFR 1.104.
NATURE OF EXAMINATION;
EXAMINERS ACTION.

37 CFR 1.105.
COMPLETENESS OF EXAMINER'S
ACTION.

37 CFR 1.106.
REJECTION OF CLAIMS.

37 CFR 1.107.
CITATION OF REFERENCES.

37 CFR 1.113.
FINAL REJECTION OR ACTION.

37 CFR 1.181.
PETITION TO THE COMMISSIONER.

37 CFR 1.191.
APPEAL TO THE BOARD OF
APPEALS

STATEMENT OF CASE

The plaintiff filed applications for three different types of tools which are as follows:

A Ratchet Extension.

Case NO. 87-1713K.

(see administrative record pages 1552, 1608, 1952 and 2166).

A set of Wrench Extensions.

CASE NO. 87-1714K.

(see administrative record pages 0768, 0818, 1191 and 1400).

A combined set of 45 Degree and 90 Degree Angled Socket Extensions.

CASE NO. 87-1715K.

(see administrative record pages 0004, 0057, 0401 and 0636).

There were four Continue In Part Applications filed on each of the three tools.

The first application on each of the three tools did not meet the format requirements of 35 . USCA 112 (see

administrative record pages 0004, 0768 and 1552).

Starting with the second application on each of the three tools the Examiner was unreasonable, unfair, arbitrary, capricious and breached constitutional due process of the Fifth Amendment of the Constitution of the United States, in his action, did not comply with the 35 USCA 101, 35 USCA 102, 35 USCA 103, 37 CFR 1.104, 37 CFR 1.105, 37 CFR 1.106, 37 CFR 1.107, (see administrative record pages 0057, 0818 and 1608) (see administrative record pages 0058 & 0146, 0855 & 0933 and 1650 & 1716),

In reference to the Opinion issued by the United States Court of Appeals for the Federal Circuit, page 3 lines 40-41 of the Opinion in which it states that the suits in district court were premature because the fourth application is still pending and without any assured changes in procedure the fourth

application could be rejected by the Examiner and that the applicant can seek judicial review pursuant to either 35 U.S.C. 141 or 145.

The Fourth Application cannot be subject to the Board Of Appeals and 37 CFR 1.191, whereas, the Fourth Application has the (CIP) CONTINUATION IN PART established under 35 USC 120 and 37 CFR 1.60 the CIP attaches the Fourth Application from the First Rejection of the First Application through First Rejection of the Fourth Application giving right to bring the suit in District Court.

The Defendants Decisions on each of the 37 CFR 1.181 Petitions to the Commissioner, have responded as though the Application was one Application that is, from the First Application through the First Action on the Fourth Application and said that the Application was subject to the Board Of Appeals, which is not true as the issue

as raised by the applicant is procedure not merit as the Defendants have stated and it has not mattered to the Defendants if the 37 CFR 1.181 Petitions to the Commissioner was filed, after the first action, after the second action or after the third action or with a new CIP Application when filed.

Therefore and because of the response to the Petitions to the Commissioner were always treated the same which was based on the merit issue and not the procedure issue as raised by the applicant, the decisions to the 37 CFR 1.181 Petitions to the Commissioner, the Defendants has treated the CIP Applications as ONE CONTINUOUS APPLICATION, therefore, the DECISION And OPINION OF THE UNITED STATES COURT OF APPEALS for the FEDERAL CIRCUIT in trying to support by AFFIRMING the SUMMARY JUDGMENT MEMORANDUM and ORDER of the DISTRICT COURT for the DISTRICT of KANSAS, the DECISION and the OPINION of

the UNITED STATES COURT of APPEALS for the FEDERAL CIRCUIT which states that the SUIT IN DISTRICT COURT WAS PREMATURE, is a RULING THAT RULES THAT THE DEFENDANTS ARE WRONG in the Decisions on the Petitions to the Commissioner.

In fact, the UNITED STATES COURT OF APPEALS for the FEDERAL CIRCUIT in its Decision to affirm the Summary Judgment, is no more than a effort to find for the Defendants but in fact ruled the Defendants are wrong in the Decisions to the 37 CFR 1.181 Petitions to the Commissioner and the APPEALS COURT never really looked into the facts to see what the true facts are.

The facts are that after one application has been once or twice rejected by the examiner, the applicant can turn to 37 CFR 1.113. (see appendix for 60 Am Jur 2d page 400 Section 495), for questions of prematureness of final rejection should be raised while the

case is reviewable by PETITION TO THE COMMISSIONER and see references 45, 46, 47 and 48).

A petition to the Commissioner under 37 CFR 1.181 may be taken to the Commissioner from ANY ACTION OR ANY REQUIREMENT OF A PATENT EXAMINER IN THE EX PARTE PROSECUTION OF A APPLICATION. (See appendix for 60 Am Jur pages 434 and 435, for PETITION TO THE COMMISSIONER A. In General Sections 566-571).

There is not one statute or Code of Federal regulations that requires a applicant to file three or four applications before a suit can be filed in the district court, (the requirement is, one application once or twice rejected) 37 CFR 1.113 gives a choice of 37 CFR 1.191 for merit issues through the Board of Appeals and choice of 37 CFR 1.181 for procedure issues and a petition to the Commissioner as the board of Appeals cannot take up the

procedure issues.

After one application is twice rejected by the Examiner and the applicant has procedure problem with the Examiner then he is required to file a petition to the Commissioner for correction of the procedure problem under 37 CFR 1.181 and if the procedure problem is not corrected by the petition to the Commissioner then after one petition (that is, one, not several petitions) to the Commissioner has not brought about a correction of the procedure problem then by 35 U.S.C. 141 and 145 the applicant may filed suit in District Court were he resides.

The suit can be filed in accordance to 60 Am Jur 2d page 437 starting with B. Judicial Review of the Commissioners Decisions (sections 572-575). 60 Am Jur 2d B. and the research references are 35 USCS 141.

60 Am Jur 2d section 572
Jurisdiction of District Court and names
the Court of for the Federal Circuit as
the appeal Court. Re Makari (Ca FC) 708
F2d 709, 218 USPQ 193

60 Am Jur 2d section 573 Review by
the way mandamus. that the Decisions of
the Commissioner of Patents are
reviewable in district Court by
mandamus. Application of Mindick, 54
Cust & Pat App 1053, 371 F2d 892.

Application of Wiechert, 54 CCPA
957, 370 F2d 927, 152 USPQ 247.

60 Am Jur 2d section 574 Review
under Administrative procedure Act Title
5 USCS section 701.

60 Am Jur 2d section 575 What
determinations are reviewable. Mandamus
will lie or an action under the
Administrative Procedure Act and to
compel him to sign a Patent.
Butterworth V. United States, 112 US
50, 28 L Ed 656, 5 S Ct 25.

THE FIRST SPECIFIC BREACH OF
ADMINISTRATIVE PROCEDURE

The first specific breach of Administrative Procedure in the Administrative Record, by the defendants was in the first action by the Examiner of the second application in which the Examiner was unreasonable, unfair, arbitrary, capricious and breached constitutional due process of the Fifth Amendment of the Constitution of the United States, (See first Action and Administrative Record pages 0085-0086, 0789-0791 and 1579-1581). The specific breach of administrative procedure is as follows:

The Examiners action did not comply with the following Code of Federal Regulations:

37 CFR 1.104, NATURE OF EXAMINATION;
EXAMINERS ACTION

37 CFR 1.105, COMPLETENESS OF EXAMINER'S
ACTION

37 CFR 1.106, REJECTION OF CLAIMS

37 CFR 1.107. CITATION OF REFERENCES

In his first and second action the examiner never made a thorough study thereof and never made a thorough investigation of the available prior art relating to the subject matter of the claimed invention. The Examiner's action was not a complete examination with respect both to compliance of the application with the applicable statutes and rules, (case law).

While the Examiner applied his interpretation of prior art in his actions and rejected the claim under his interpretation of statute 35 U.S.C. 103 (obviousness), the Examiner did not support his interpretation of 35 U.S.C. 103 in accordance with the cases under 35 U.S.C. 103 as required by the manual of Patent procedure page 1 of the Introduction and the paragraph on Decisions which States as follows:

"In addition to the statutory regulations, the actions taken by the examiner in the examination of applications for patents are to the great extent governed by decisions on prior cases."

The Examiner in his action never responded to the cases cited by the applicant in the Examiner's argument for nonpatentability.

Therefore his the Examiners action was not complete nor thorough and did not comply with 37 CFR 1.104.

The Examiner's premature action did not comply with 37 CFR 1.105, whereas, 37 CFR 1.105 states that the examiner's action will be complete as to all matters and the Examiner did not complete a examination with reference to all matters when his action did not include the a decision based on the citing cases under 35 U.S.C. 103 nor reference to the cases cited by the applicant.

The Examiner's action did not comply with 37 CFR 1.106(b) that states,

In rejecting claims for want of novelty or for obviousness, the examiner must cite the best references at his command. Moreover, the Examiner never cited the best references at his command because he never cited any case at all which cannot be the best references at his command.

The Examiner never responded to the applicants calling for the examiner to cite any specific facts of his interpretation of 35 U.S.C. 103 (obviousness) and in view of the cases submitted into the applications by the applicant and by not supporting his action by citing the cases was in violation of 37 CFR 1.107.

To be complete to all matters and to make a thorough examination the Examiner would have had to respond to the following subject matter in the cases cited by the plaintiff in the rebuttals and amendments, without responding to the cases the Examiner did

not make a thorough study and a complete examination as to all subject matter in the applications.

The Examiner did not comply with the Courts interpretation of 35 U.S.C. 112, 35 U.S.C. 101, 35 U.S.C. 102 and 35 U.S.C. 103 because his interpretation of those statutes are different than the courts and the decisions by case law.

The following subject matter that pertains to obviousness and are included in the cases which are not the same as the Examiners interpretation as to obviousness.

#1 What is obviousness as defined by patent statutes and rules, case law?

#2 What is nonobviousness as defined by patent statutes and rules, case law?

#3 What is mere mechanical skill as defined by patent statutes and rules?

#4 How should prior art be read when making a inquiry into a what level of skill was involved in the creation of the invention at issue?.

#5 Who is the person of ordinary skill?

#6 Should the examiners substitute themselves for the person of ordinary of skill?

#7 What is unexpected properties?

#8 What is Synergistic effect?

#9 What is anticipation as defined by patent statutes and rules?

#10 What is hindsight and foresight as defined by patent statutes and rules?

#11 Is modifying or combining features of prior art to bring about a new combination of old elements invention when a new mode or operation is produced and does this sustain a patentable invention as defined by patent statutes and rules?

#12 Can a little modification sustain a patent or must a little modification negate patentability as defined by patent statutes and rules?

#13 What is prima facie obviousness; how is a prima facie case of obviousness established, what is required by the

applicant if a prima facie case of obviousness is established, how can a prima facie case rebutted, is a prima facie case of obvious a fact?

#14 Can a patent be obtained if all of the elements in an application are found in prior art or in several prior art patents?

#15 What is a ex parte examination?

#16 What is a "afterseen" obviousness?

#17 How much physical change or how little physical is needed or required to sustain a patent?

#18 Is it legal to read into prior art the disclosure in a patent application?

#19 What is the effect of each of the prior patents or publications four corners on an application for patent issue?

#20 Will combining of elements in different prior art prevent invention?

#21 Is prima facie obviousness a fact?

#22 Can a simple solution to a problem be invention?

#23 How much or how little or how slight change in old construction add still constitute invention?

#24 How much physical change is needed to be invention?

#25 Will simplicity of operation deny a patent?

The above examples are only some of the subject matter that the examiner must address to be complete to all matters, and to make a thorough examination of a application.

An Amendment was filed October 15, 1985, (See administrative record for the Amendment on pages 0098, 0876 and 1677), by the plaintiff which specifically pointed out the errors of the Examiner's First Action in accordance with 37 CFR 1.111 and 37 CFR 1.112 and was supported by cases that have the Courts interpretations as to what how and why 35 USCA 112, 35 USCA 102 and 35 USCA 103 is interpreted which is not the same as the Examiner's interpretation of

those statutes. Whereas, the act of interpretation of a statute is not "MERIT" but is a action which is "PROCEDURE" as defined by any dictionary.

The Amendment filed October 15, 1985 is as follows:

Pages 0098 and 0099 is a rewritten claim in accordance with 37 CFR 1.111, 37 CFR 1.112, 37 CFR 1.118 and 35 U.S.C. 132.

The Amendment pages 0100 through 0104 are to explain the changes to be made in the text to comply with 35 U.S.C. 112.

The Amendment pages 0105 through 0117 are to cite the cases that are under 35 U.S.C. 101, 35 U.S.C. 102 and 35 U.S.C. 103 and 35 U.S.C. 112 that are closely related in subject matter that proves that the rejection of the claim was improper and the used only his own interpretation of those statues.

Starting with Amendment pages 0118 through 0124 the exact wording of the

cases cited on pages 0105 through 0117 only with connective words added between the cases, in which the cases are so closely related that a person reading the cases would not know that the words are a way to connect the cases into larger paragraphs.

The exact wording of cases by the courts with connective words are repeated on pages 0125 through 0135 and applied to the invention to which the amendment was prepared.

The amendment concluded with the concluding argument on pages 0135 and 0136 with a request for reconsideration for letters patent issue.

The Defendants have never read the amendments or rebuttals for they would have known that the cases cited were applied to the invention that the amendment was prepared. in the amendment of October 15, 1985 that is on pages 0085-0087 is the 45 Degree and 90 Degree Angled Socket Extension Set, Serial No.

6,671,168 in which the cases cited by the applicant was applied to the invention.

The plaintiff has made a complete and thorough study of not only prior art as the Examiner did but also, a complete and thorough study of the Rules and Statutes with a complete study of the cases under the above cited Statutes.

Every application, every rebuttal and every amendment filed by the applicant on/or after October 15, 1985 repeated the complete and thorough response to the examiner's action in the same manner as the amendment cited above.

Every action by the Examiners after October 15, 1985 was a repeat of the same rejection as though the applicant had never responded to any of the rejections and the breach of administrative due process was repeated without any response to the procedure change requested by the applicant.

By the use of 37 CFR 1.113 the

applicant was in pursuant to 37 CFR 1.181, Petition to the Commissioner of Patents for review of the Examiner's examining procedure by the Commissioner's Supervisors, (see administrative record pages 0149, 0936 and 1719), however the procedure used by the commissioner's Supervisors did not review the Examiner's examining procedure, instead, reviewed if the examiner had made a rejection, (see administrative record page 0257).

All the Petitions to the Commissioner under 37 CFR 1.113 and 37 CFR 1.181 have been answered in the same manner without response to the Statutes, Rules and cases where the purpose of the petitions have been ignored.

In answer to the Petitions to the Commissioner the Defendants refuse to read 37 CFR 1.113 as written and applied their own answer to what 37 CFR 1.113 and 37 CFR 1.181 means and how they are to be used, whereby, the Defendants did

not and do not make the correct demarcation between the two Channels of Ex Parte Review as shown and written on page 1200-1 of the Manual of Patent Examining Procedure.

Whereas, 37 CFR 1.113(a) states that, On the second or any subsequent examination or consideration the rejection or other action may be made final, whereupon applicant's or patent owner's response is limited to appeal in the case of rejection of any claim (1.191), or to amendment as specified in 1.116.

Petition may be taken to the Commissioner in the case of objections or requirements not involved in the rejection of any claim (1.181).

Starting with 37 CFR 1.113 where there is a clear line of demarcation between the use of 37 CFR 1.191 or the use of 37 CFR 1.181 by the word -----OR----- which gives a choice of one or the other 37 CFR 1.191 or 37 CFR

1.181 but both are not to be used.

The Defendants in the response to the Petitions to the Commissioner read 37 CFR 1.113 without the -----OR----then state that there is not any line of demarcation set in 37 CFR 1.113 and the only requirement is the use of 37 CFR 1.191 which is only true if there is not any required procedure at all and the Examiners can do as they please and are not required to limit the examination to the statutes and rule.

The prior printing of page 1200-1 of the Manual of Patent Examining Procedure has the drawing of the two Channels of Ex Parte Review but the current Manual does not show the drawing, however, the Statutes and Rules did not change and the two Channels of Ex Parte Review are the same as when the drawing was shown in the manual.

In the application of 37 CFR 1.113,

37 CFR 1.181, and 37 CFR 1.191 and the line of demarcation between procedure issues and merit issues the Channels of Ex Parte Review as set forth in the Manual of Patent Examining Procedure page 1200-1, in which the the drawing of the the Channels of Ex Parte Review shows clearly the line of demarcation between the two Channels of Ex Parte Review, Procedure and merit.

When the use of 37 CFR 1.113, 37 CFR 1.181 and a Petition to the Commissioner the applicant is required to repeat the application to the Examiner at the same time as the Petition to the Commissioner as stated in 37 CFR 1.181(c) When a petition is taken from an action or requirement of an examiner in the ex parte prosecution for an application, it may be required that there have been a proper request for reconsideration (1.111) and a repeated action by the examiner.

A SPECIFIC BREACH OF
ADMINISTRATIVE DUE PROCESS

On July 22, 1988 a letter was mailed to the applicant to try to claim that the Fourth CIP Application was not copending with the Third CIP Application, However that letter was in error as the Defendants did not take any action at all in EIGHT MONTHS (8) on the third CIP Application Serial No. 873,504, in which the second action by the Examiner was due in sixty days (60) from the date the applicant filed the amendment to the Examiner's first action, there was not any response to at all in the eight months by the defendants which constitutes a breach of Due Process

THE SUMMARY JUDGMENT OF DISTRICT
COURT FOR THE DISTRICT OF KANSAS

The Summary Judgment, Memorandum and Order of District Court for the District of Kansas entered on June 29, 1989, in which the opinion is not supported by the findings of fact and is contrary to the applicable law, and in violation of Title 28 USCA, Rule 16(a), (b) and (c #3) and was inappropriately based on limited and timed hearings without a trial which is inappropriate.

Title 28 USCA Rule 16(a), (b) and (c #3) states that scheduling pretrial conferences are inappropriate when the complaint is filed to review administrative actions on the record made before the administrative agency in accordance with Title 5 USCA 500-706 (See, 60 Am Jur 2d page 437 starting with B. Judicial Review of the Commissioners Decisions, sections 572-575 by the way of 35 USCS 141) and

the review of ADMINISTRATIVE PROCEDURE where jurisdiction and venue is under 28 USCA 1338, 28 USCA 1361, 28 USCA 1391 and Title 35 USCA 102, 35 USCA 103, 37 CFR 1.113, 37 CFR 1.181 and The Fifth Amendment of the United States Constitution and where the complex matters of the case can only be resolved by appropriate trail.

The District Court for the District of Kansas on June 29 1989, was in violation of Title 28 USCA and rule 16(a), (b) and (c) by holding hearings that was so limited in time, that the limited time never allowed for bringing out the proof of the violation of the laws in the case and the facts can only be resolved holding a trial as the plaintiff's complaints was filed to review by trial, the Patent and Trademarks Office administrative procedures used to examine the plaintiff's application and record filed in the Patent Office.

The summary judgment, memorandum and order violated Title 35 USCA and 37 CFR 1.113 and 37 CFR 1.181, as well as, Title 5 USCA 500-706, whereby, the plaintiff has filed for review by trial the administrative procedure used by the defendants to examine the plaintiff's applications and the District Court only reviewed the merit issue, whereupon, The facts on which petitioner relies for obtaining the relief sought herein are as follows:

1. The Summary Judgment and Order by the District Court for the District of Kansas filed June 29, 1989 wrongly construed the complaints and amended complaints filed by the plaintiff against the defendants into a merit issue from a clear procedure issue as filed by the plaintiff.

2. Whereby, the Court in the summary judgment, memorandum and order made a issue of merit and a decision of merit issue, instead of a issue of

procedure and a decision of procedure issue which is in violation of Title 35 USCA 141, 35 USCA 102, 35 USCA 103, 37 CFR 1.113, 37 CFR 1.191, 37 CFR 1.181 and the Manual of Patent and Examining Procedure page 1200-1. (See, 60 Am Jur 2d page 437 starting with B. Judicial Review of the Commissioners Decisions, sections 572-575).

3. A issue of merit can only be considered and a decision of merit be made by the the Board of Appeals or the Appeals to Court of Appeals for the Federal Circuit 35 USCA 141, or by the Civil Action in the District Court for the District of Columbia 35 USCA 145 and 5 USCA 704, whereas, the Board of Appeals cannot take up the issue of procedure.

4. Whereas, the Summary Judgment did not address the Procedure issue as filed in the Complaints and Amended Complaints by the plaintiff the Court did violate the Fifth Amendment of the

United States, and Due Process.

5. By accepting a merit issue as a defense from the defendants into the District Court for the District of Kansas, the Court allowed the issue of merit to be entered in the Court in violation of 37 CFR 1.113, 37 CFR 1.181 and the Patent Examining Procedure Manual page 1200-1 as the Congress of the United States wrote into those statutes a line of demarcation between procedure issues and merit issues and explained on page 1200-1 of the Manual of Patent Examining Procedure.

6. The Court did not follow the line of demarcation between procedure issues and merit issues as set forth in the Manual of Patent Examining Procedure page 1200-1, 37 CFR 1.191 (merit issues) and 37 CFR 1.181 (procedure issues) but allowed the defendants statements, stating that there is not any line of demarcation between the procedure issues and merit issues and the Court allowed

the defendants statements that procedure issues and merit issues are not separable whereas, the two issues are clearly separable as set forth by Congress, thereby the summary judgment, memorandum and order entered by the court June 29 1989 was in violation of the aforementioned statutes.

7. Whereas, the plaintiff had correctly followed the line of demarcation (37 CFR 1.113) between procedure issues (37 CFR 1.181) and merit issues (37 CFR 1.191 and review by the Board of Appeals was not filed) and correctly filed a complaint in the District Court For The District of Kansas, Civil action against the Commissioner of Patents, Judicial Review (Procedure Issues) under Title 35 USCA 141, 37 CFR 145, Title 5 USCA 500-706 and The Fifth Amendment of The Constitution of The United States, Jurisdiction and Venue for the District Court For The District of Kansas, by the

way of Mandamus has been covered properly in the Plaintiff's Complaint.

THE OPINION AND RULING THE
UNITED STATES COURT OF
APPEALS FOR THE CIRCUIT

In reference to pages 1 and 2, lines 1-5 of the Opinion.

"The present action arises from a lengthy history of patent prosecution in the United States Patent and Trademark Office (PTO) by the appellant, proceeding Pro Se. Following the PTO proceedings, he filed three civil actions in the United States District Court for the District of Kansas."

In reference to page 2, lines 8-9 of the Opinion.

"Since Mr. Stagner failed exhaust his administrative remedies,..."

And in reference to page 3, lines 40-41

of the Opinion.

"Although Mr. Stagner's suits in the district court were premature, ..."

And in reference to page 3, lines 45-49 of the Opinion.

"His fourth patent patent application is still pending in the PTO. If it is finally rejected by the examiner, he can appeal within the PTO and if dissatisfied with that decision, he can seek judicial review pursuant to either 35 U.S.C. section 141 or 145."

And in reference to page 3, lines 38-40 of the Opinion.

"Thus, Mr. Stagner's disputes with the examiner's grounds for rejection are disputes on merit of his applications."

The Summary Judgment by the District court and the opinion of the United States Court of Appeals for the

federal Circuit are based on a MERIT ISSUE which is not legal by the statutes 35 U.S.C. 141, 37 CFR 1.113, 37 CFR 1.181 and the Manual of Patent Examining Procedure page 1200-1. (See, 60 Am Jur 2d page 437 starting with B. Judicial Review of the Commissioners Decisions, sections 572-575).

A issue of merit can only be considered and a decision of merit be made by the the Board of Appeals or the Appeals to Court of Appeals for the Federal Circuit 35 USCA 141, or by the Civil Action in the District Court for the District of Columbia 35 USCA 145 and 5 USCA 704, whereas, the Board of Appeals cannot take up the issue of procedure.

By affirming the District Court Summary Judgment the opinion of the United States Court of Appeals for the federal Circuit accepted a merit issue as a defense from the defendants into the District Court for the District of

Kansas, the Court allowed the issue of merit to be entered in the Court in violation of 37 CFR 1.113, 37 CFR 1.181 and the Patent Examining Procedure Manual page 1200-1 as the Congress of the United States wrote into those statutes a line of demarcation between procedure issues and merit issues and explained on page 1200-1 of the Manual of Patent Examining Procedure.

After one application has been twice rejected by the examiner, the applicant can turn to 37 CFR 1.113.

There is not one Statute or Code of Federal regulations that requires a applicant to file three or four applications before a suit can be filed in the district court, (the requirement is, one application twice rejected) 37 CFR 1.113 gives a choice of 37 CFR 1.191 for merit issues through the Board of Appeals and choice of 37 CFR 1.181 for procedure issues and a petition to the Commissioner as the board of Appeals

cannot take up the procedure issues.

After one application is twice rejected by the Examiner and the applicant has procedure problem with the Examiner then he is required to file a petition to the commissioner for correction of the procedure problem under 37 CFR 1.181 and if the procedure problem is not corrected by the petition to the Commissioner then after one petition (that is, one, not several petitions) to the commissioner has not brought about a correction of the procedure problem then by 35 U.S.C. 141 and 145 the applicant may filed suit in District Court were he resides.

The fact is that the statements, a lengthy history of patent prosecution in the PTO by the appellant, and Mr, Stagner's Suits in the district court were premature, are contrary, one to the other and both cannot be true, in which the statement that, the suites in district court were premature, is is not

the correct statement.

In reference to page 3, lines 44-45 of the Opinion.

"Finally, we note that our decision in this appeal dose not leave Mr. Stagner without remedy."

The only remedy that is available to a applicant of patent to correct a wrong procedure starts with a petition to the Commissioner by the way of 37 CFR 1.113 and 37 CFR 1.181 and then if the wrong procedure is not corrected by the Commissioner the the next step is to file suit in the district court by the way of 35 U.S.C. 141. (See, 60 Am Jur 2d page 437 starting with B. Judicial Review of the Commissioners Decisions, sections 572-575).

REASONS FOR GRANTING WRIT

The Supreme Court should grant the Petitioner a writ of certiorari issue to review the June 29, 1989, Summary Judgement, Memorandum and Order of the United States District Court for the District of Kansas, that was affirmed by Decision of the United States Court of Appeals for the Federal Circuit and entered on January 25, 1990.

The Decision and Opinion of the United States Court of Appeals for the Federal Circuit has a "Note" at the top of first page.

"This opinion has not been prepared for publication....and is not of widespread legal interest."

While this case has not had any publicity to cause it to have widespread legal interest and public interest, there is widespread legal and public interest in the Administrative Procedure used by the Patent and Trademark Office

in the examination of patents. In fact a short time ago, there were some members United State Congress that publicly complained about the Administrative Procedure used by the Patent Office in the examination of patent applications.

Therefore, this case being the first case in some time to come before the Supreme Court with complaints about the Administrative Procedure used by the Patent Office in the examination of patent applications the Supreme court should grant the writ for the certiorari and review this case.

Congress separated by a line of demarcation (37 CFR 1.113) into two remedies for disputes in the examination of patent applications, one merit of the invention (37 CFR 1.191) and the other Administrative procedure used in the examination of patent application (37 CFR 1.181). This case was filed in the District Court for the District of

Kansas in accordance with 37 CFR 1.113, 37 CFR 1.181, 35 USCA 141 and 35 USCA 145 Title 5 USCA 500-706 and the Due Process of the Fifth Amendment of the Constitution, for review of the the Patent and Trademark Administrative Procedure in the examination of patents and then a defense of merit was entered only as a way to avoid the review of patent Administrative Procedure used in the examination of these applications. The Fourth Application cannot be subject to the Board Of Appeals and 37 CFR 1.191, whereas, the Fourth Application has the (CIP) CONTINUATION IN PART established under 35 USC 120 and 37 CFR 1.60 the CIP attaches the Fourth Application from the First Rejection of the First Application through First Rejection of the Fourth Application giving right to bring the suit in District Court. The Defendants Decisions on each of the 37 CFR 1.181 Petitions on the

Commissioner, have responded as though the Application was one Application, that is, from the First Application through the First Action on the Fourth Application and said that the Application was subject to the Board Of Appeals, which is not true as the issue as raised by the applicant is procedure not merit as the Defendants have stated and it has not mattered to the Defendants if the 37 CFR 1.181 Petitions to the Commissioner was filed, after the first action, after the second action or after the third action or with a new CIP Application when filed, the response to the petitions to the Commissioner were always the same which was based on merit issue not the procedure issue raised by the applicant.

Therefore and because of the decisions to the 37 CFR 1.181 Petitions to the Commissioner, the Defendants has treated the CIP Applications as ONE CONTINUOUS APPLICATION, therefore, the DECISION

OPINION OF THE UNITED STATES COURT OF APPEALS for the FEDERAL CIRCUIT in trying to support by AFFIRMING the SUMMARY JUDGMENT MEMORANDUM and ORDER of the DISTRICT COURT for the DISTRICT of KANSAS, the DECISION and the OPINION of the UNITED STATES COURT of APPEALS for the FEDERAL CIRCUIT, which states, that the SUIT IN DISTRICT COURT WAS PREMATURE is a RULING THAT RULES THAT THE DEFENDANTS ARE WRONG in the Decisions to the Petitions to the Commissioner.

In fact, the UNITED STATES COURT OF APPEALS for the FEDERAL CIRCUIT in its Decision to Affirm the Summary Judgment, is no more than a effort to find for the Defendants but in fact ruled the Defendants are wrong in the Decisions to the 37 CFR 1.181 Petitions to the Commissioner and the APPEALS COURT never really looked into the facts to see what the true facts are.

The facts are that after one application has been once or twice rejected by the

examiner, the applicant can turn to 37 CFR 1.113. (see appendix for 60 Am Jur 2d page 400 Section 495), for questions of prematurity of final rejection should be raised while the case is reviewable by PETITION TO THE COMMISSIONER and see references 45, 46, 47 and 48).

A petition to the Commissioner under 37 CFR 1.181 may be taken to the Commissioner from ANY ACTION OR ANY REQUIREMENT OF A PATENT EXAMINER IN THE EX PARTE PROSECUTION OF A APPLICATION. (See appendix for 60 Am Jur pages 434 and 435, for PETITION TO THE COMMISSIONER A. In General Sections 566-571).

The suit can be filed in accordance to 60 Am Jur 2d page 437 starting with B. Judicial Review of the Commissioners Decisions (sections 572-575). 60 Am Jur 2d B. and the research references are 35 USCS 141.

60 Am Jur 2d section 572 Jurisdiction of

District Court and names the Court of
for the Federal Circuit as the appeal
Court. Re Makari (Ca FC) 708 F2d 709,
218 USPQ 193

60 Am Jur 2d section 573 Review by the
way mandamus. that the Decisions of the
Commissioner of Patents are reviewable
in district Court by mandamus.
Application of Mindick, 54 Cust & Pat
App 1053, 371 F2d 892.

Application of Wiechert, 54 CCPA 957,
370 F2d 927, 152 USPQ 247.

60 Am Jur 2d section 574 Review under
Administrative procedure Act Title 5
USCS section 701.

60 Am Jur 2d section 575 What
determinations are reviewable. Mandamus
will lie or an action under the
Administrative Procedure Act and to
compel him to sign a Patent.
Butterworth V. United States, 112 US
50, 28 L Ed 656, 5 S Ct 25.

The patent examiners that examined the

applications in this case had a interpretation of 35 USC 103 and what obviousness is that separate from the cases in reference under 35 USC 103.

The Examiners did not comply with the Courts interpretation of 35 U.S.C. 112, 35 U.S.C. 101, 35 U.S.C. 102 and 35 U.S.C. 103 because their interpretation of those statutes are different than the courts and the decisions by case law.

Therefore the Examiners not comply with 37 CFR 1.104, 37 CFR 1.105, 37 CFR 1.106, 37 CFR 1.107, (see administrative record pages 0057, 0818 and 1608) (see administrative record pages 0058 & 0146, 0855 & 0933 and 1650 & 1716).

By the District court allowing a merit issue for a defense of a Administrative Procedure issue and issuing the District Court Summary Judgment the Decision and Opinion of the United States Court of Appeals for the federal Circuit affirming a merit issue as a defense from the defendants into the District

Court for the District of Kansas, both Courts allowed the issue of merit to be entered in the Court in violation of 37 CFR 1.113, 37 CFR 1.181 and the Patent Examining Procedure Manual page 1200-1 as the Congress of the United States wrote into those statutes a line of demarcation between procedure issues and merit issues and explained on page 1200-1 of the Manual of Patent Examining Procedure.

After one application has been twice rejected by the examiner, the applicant can turn to 37 CFR 1.113.

There is not one statute or Code of Federal regulations that requires a applicant to file three or four applications before a suit can be filed in the district court, (the requirement is, one application once or twice rejected) 37 CFR 1.113 gives a choice of 37 CFR 1.191 for merit issues through the Board of Appeals and choice of 37 CFR 1.181 for procedure issues and a

petition to the Commissioner as the board of Appeals cannot take up the procedure issues.

After one application is twice rejected by the Examiner and the applicant has procedure problem with the Examiner then he is required to file a petition to the Commissioner for correction of the procedure problem under 37 CFR 1.181 and if the procedure problem is not corrected by the petition to the Commissioner then after one petition (that is, one, not several petitions) to the Commissioner has not brought about a correction of the procedure problem then by 35 U.S.C. 141 and 145 the applicant may filed suit in District Court were he resides.

The fact is that the statements in the Decision and Opinion of the United States Court of Appeals for the Federal Circuit, "a lengthy history of patent prosecution in the PTO by the appellant", and "Mr, Stagner's Suits in

the district court were premature", are contrary, one to the other and both cannot be true, in which the statement that, the suites in district court were premature, is is not the correct statement.

The District Court by holding hearings that was limited to very short time limit did not give the Plaintiff time to prove facts of the case and to show cause, and the District Court was in violation of 28 USC Rule 16(a), (b), (c #3) of the Rules of Practice for the District court for the District of Kansas, in holdings hearings and not reviewing by trial a Administrative record made before a United States Government Agency and the breach of Due Process of the Fifth Amendment of the Constitution United States.

The District Court did rely on:

McKenzie v. Mercy Hospital, 854
F,2d 365, 367, (10th Cir. 1988)

to examine all evidence in a light most
favorable to the Patent and Trademark

—Office, in which the case cited does not involve any government agency but is civil case only, whereas, the District Court should have been a watch dog over a government agency as the following cited case proves:

Title 5 USC 706, Note 22

Duty of Court

District court has duty to stand watch dog for any procedural due process deficiencies on part of administrative agency adversely affecting any party. Pre-Fab Transit Co. v. U.S., D.C.Ill.1969, 306 F.Supp. 1247, affirmed 90 S.Ct. 815, 397 U.S. 40, 25 L.Ed.2d 41.

There has been protest by both the Defendants and the District Court to the point of being prejudice, first in the Decisions to the 37 CFR 1,181 Petitions to the Commissioner that a Pro Se is applying for patent issue in his own applications and second, in the District Court as stated in the Summary Judgment, memorandum and Order of the District Court that a Pro se is asking to conduct his own case in a trial court under 28 USC 1654, without counsel and that

prejudiced attitude has governed the decisions of this case.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date March 30, 1990.

